

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
TYLER DIVISION

FRACTUS, S.A.	§	
	§	Civil Action No. 6:09-cv-203 (LED-JDL)
	§	
v.	§	JURY TRIAL DEMANDED
	§	
	§	
SAMSUNG ELECTRONICS CO., LTD.,	§	
et al.	§	
	§	

**DEFENDANTS' SURREPLY ON FRACTUS' MOTION FOR PROTECTIVE ORDER  
UNDER RULE 26(c) REGARDING ITS P.R. 3-1 INFRINGEMENT CONTENTIONS**

Fractus in its Reply (Dkt. 396) fails to address several key reasons why its Infringement Contentions should not be afforded confidential treatment.

First, as it did in its opening brief (Dkt. 392), Fractus alleges that the test data in its Infringement Contentions was generated at considerable expense to Fractus and is somehow “valuable.” *See, e.g.*, Dkt. 396 at 5. However, Fractus has made no attempt in either its opening brief or reply brief to establish how or why that data is so valuable or to provide the cost of generating it.<sup>1</sup> The argument is a red herring, and the reality is that the “value” of the data (or, more precisely, Fractus’ graphical representations of data which reveal very little actual data) is *only* as a component of Fractus’ litigation positions, in order to purportedly make a showing that certain of its claim limitations are met. There is no technical or other commercial value to Defendants, or in the marketplace in general, in the data generated by Fractus.<sup>2</sup>

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<sup>1</sup> Of course, the high cost of generating non-confidential litigation pleadings, such as a brief or an expert declaration, does not in and of itself render a pleading confidential.

<sup>2</sup> Notably, Fractus has not denied that this data was prepared solely for purposes of its infringement contentions, and not in connection with any other aspects of its business. Fractus failed to establish, or even allege, that it is in the business of testing antennas in the marketplace

*footnote continued on next page...*

Second, even setting aside that Fractus cannot explain to this Court how the handful of graphical representations of its data at issue has value outside of the litigation, Fractus completely failed to address the alleged confidentiality of the vast majority of its Infringement Contentions that is information *other than* the representations of its test data. Indeed, in footnote 3 of its Reply, Fractus concedes that it has no basis at all to seek protection for that other information which includes the public language of its patent claims matched up with public information about Defendants' products (primarily photos), public information about wireless industry standards, and other public information.

Third, Fractus argues that Defendants have not shown good reason for disclosure of the Infringement Contentions. However, in accordance with the Protective Order, it is *Fractus'* burden to show that the information should be maintained as confidential – not the other way around. Dkt. 266 at ¶ 5 (“the burden of proof shall lie with the producing party [*i.e.*, Fractus] to establish that the information is, in fact, properly designated as CONFIDENTIAL”). Fractus plainly did not meet its burden. Fractus is therefore no more entitled to an explanation of how Defendants plan to use the Infringement Contentions than Defendants are entitled to a list of the names of people to whom Fractus distributes copies of any other non-confidential pleading or document in this case.

Again, Fractus did not even attempt to explain how or why the data or representations thereof are valuable and should be suppressed (including by failing to cite any authority or precedent holding that a plaintiff's infringement contentions can be protected confidential

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and/or selling those test results across the industry. The reason Defendants may share the Infringement Contentions with others, *e.g.*, suppliers, has nothing to do with any technical value in that test data, and everything to do with properly educating other interested parties about the details of Fractus' infringement assertions in this litigation as Defendants see fit.

information).<sup>3</sup> Fractus likewise did not demonstrate how or why it would be harmed by the submission of that data to the PTO. The truth of the matter is that the only potential harm to Fractus is not in connection with its business, but in connection with its litigation strategy.

In any event, Defendants have shown at least one highly important use of the contentions – sharing them with the PTO in a reexamination. As discussed in Defendants’ opposition, it will be important for the PTO to understand during reexamination just how broadly Fractus is trying to read its patent claims in this case. Fractus’ Infringement Contentions are plainly material information as they are admissions from Fractus that its claims, to the extent they could possibly be construed as reading on Defendants’ products, would read directly on hundreds of prior art references. The reexamination proceeding can provide helpful data points for this Court (as well as for the parties), and may aid in significantly narrowing the issues in this case. Ultimately, the Defendants simply want to avoid being caught between competing positions – narrow claim positions in the PTO but broad claim positions in this litigation – and submission of the Infringement Contentions to the PTO will be an important preventative measure in that respect.

Finally, Fractus addresses ¶ 4(e) of the Protective Order, which expressly provides that “**Non-Confidential Information**” shall include “information that has been discerned through legal examination of the accused product itself without the use of defendants’ Protected, Confidential, or Highly Confidential – Attorneys’ Eyes Only Information,” only to say that its plain meaning should not be applied. Dkt. 396 at 3-4. However, the information Fractus now seeks to protect, is precisely the information that ¶ 4(e) says is *not* confidential.

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<sup>3</sup> Indeed, there is no such precedent; Fractus is, by its motion, asking this Court to set a radical new precedent regarding the protection of a plaintiff’s litigation positions.

For the foregoing reasons, Defendants<sup>4</sup> respectfully request that the Court deny Fractus' motion for a protective order in its entirety.

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on May 26, 2010. Any other counsel of record will be served by First Class U.S. mail on this same date.

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